Date: October 29, 1999
Case No.: 1998-STA-00027
In the Matter of:

ALEXANDER KOROLEV,
Complainant

vs.

ROCOR INTERNATIONAL, D/B/A ROCOR TRANSPORTATION COMPANIES
Respondent.

Before: Lawrence Donnelly
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. JURISDICTION

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter the "STAA"), as amended, 49 U.S.C. §§31105, and the regulations in 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or refuse to operate a vehicle when such operation would be in violation of those rules.

II. PROCEDURAL BACKGROUND[1]

On May 6, 1998, Complainant, Alexander Korolev, ("Complainant") filed a complaint with the Secretary of Labor, alleging Rocor International ("Respondent") discriminatorily discharged him in retaliation for refusing to continue driving a commercial vehicle over a specified time limit and while fatigued (JX 1). The Department of Labor investigated the complaint and found the Respondent had discharged the Complainant based on legitimate business reasons rather than activities protected by §31105 of the STAA. On July 14, 1998, the Secretary issued findings dismissing the complaint. *Id.* On July 17, 1998, Complainant mailed his objections to the Secretary's Findings and requested a hearing on the record. *Id.*

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[1]The following abbreviations will be used as citations to the record: ALJX- Administrative Law Judges Exhibits; JX - refers to the joint exhibits submitted by both parties at the hearing; CX- refers to complainant's exhibits; RX - to respondent's exhibits; TR-Transcript of the hearing.

A hearing was held before me on December 15, 1998, in Jacksonville Florida, at which time both parties were given the opportunity to present their cases. The Administrative Law Judge entered ALJ Exhibits 1-4 which reflected the procedural history of this matter and the underlying agreements the parties could reach (TR 5-6). A joint exhibit was received containing procedural and jurisdictional stipulations (JX1; TR 6).[2] Respondent's Exhibits 1, 3, 4, 5, 6, and 7 (TR 241, 155). Complainant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, and 11 were admitted into evidence (TR 21, 24, 47, 61-71, 119, 214). Complainant marked, but never formally moved CX 9, a statement of Alan N. Smith, into the record (TR 179). As Respondent does not object to the admission of CX 9 (TR 242), it is herewith received. Upon careful review, Complainant never introduced CX 12.

Prior, during and after the hearing, Respondent continued a motion to strike testimony and evidence presented by Gary W. Wilson, sleep technician (*Respondent's Motion in Limine,* TR 119-120, *Respondent's March 1, 1999 Renewed Motion to Strike*). Specifically, the Respondent objected to the relevancy of Wilson's testimony and his qualifications as a testifying witness based on lack of personal knowledge or testing of the Complainant.[3] *Id.* Complainant argues one factor of their case is whether or not ability and alertness were impaired due to fatigue and Mr. Wilson is uniquely qualified, due to his experience at sleep labs to testify about the effects of fatigue and sleep deprivation (TR 113-114).

While I question the probative value of this testimony as it pertains to the facts of this case, I am persuaded this testimony is admissible. Mr. Wilson has more than eight years of experience as a polysomnographer[4] at the Savannah Sleep disorder Center (TR 116). In his position Mr. Wilson was personally involved in hundreds of sleep studies, a few specifically involving long-haul truck drivers (TR 117-118). Finally, Mr. Wilson testified he reviewed the Complainant's driving logs prior to the hearing (TR128).

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[2]The trial transcript reflects the joint exhibit containing the parties stipulations was originally marked as CX1. Upon review of the record, Complainant offered another exhibit which was marked and received as CX1 (TR 24). Because of the duplicate numbering, I will remark and receive the parties stipulations as JX1.

[3]Respondent relies 29 C.F.R. § 18.701 which states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witnesses' testimony or the determination of a fact in issue.

[4]Mr. Wilson defines polysomnography as the study of sleep by attaining data to assess one's sleep processes (TR 116-117).

Respondent also objected to the admission of and testimony referring to CX 13, an article titled "The Sleep of Long Haul Truck Drivers" on hearsay[5], qualification, and relevancy grounds (TR 119). Complainant argues that 29 C.F.R. §18.803(a)(18) of the Rules of Practice and Procedure for hearings before Administrative Law Judges, excepts the admission and testimony relating to this article from the hearsay rule.[6]

At the hearing, I overruled the Respondent's objection and received CX 13 into the record. (TR 121). Respondent's counsel further argued that even "if admitted, the statements may be read into evidence but not received as exhibits." (Fed.R.Evid. 803). Having studied the article Complainant submitted with his brief, I find that it is a study of sleeping patterns exhibited by long-haul drivers. The paper addresses the sleeping habits during the actual driving time but fails to note any experiments performed on drivers who are awoken following a short nap. I considered the Respondent's objection and because this proceeding is not bound by the federal rules of evidence, I will not upset my prior ruling at the hearing. I note that I accord this article little weight because of its limited probative value in assessing the particular circumstances of the present Complainant's claim.

III. STIPULATIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (JX 1):

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and subject matter of this proceeding.

2. The Respondent is a motor carrier engaged in interstate trucking and is an employer subject to the STAA, 49 U.S.C. §§ 31105.

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[5]Hearsay is defined at 29 C.F.R. §18.801(c) as "a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted." A statement an oral or written assertion. 29 C.F.R. §18.801(a). The hearsay rule as it pertains to the present proceedings is found at 29 C.F.R. §18.802. The rule states in pertinent part: "Hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress."

[6]Specifically, Rule §18.803(a)(18) states:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on the subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by official notice.

3. The Complainant is now and at all times material herein, an "employee" of the as defined by 49 U.S.C. § 31101(2). Complainant was an employee of the Respondent from August 21, 1997 until February 7, 1998.

4. The Complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways in interstate commerce to transport cargo.

5. On or about May 6, 1998, pursuant to 49 U.S.C. § 31105, Complainant timely filed a complaint with the Secretary of Labor alleging that the Respondent discriminated against him in violation of STAA § 31105.

6. The Regional Administrator, Occupational Safety and Health Administration (hereinafter "OSHA"), served his findings on July 14, 1998.

7. On or about July 17, 1998, pursuant to 29 C.F.R. § 1978.105(a), Complainant timely mailed his objections to the Secretary's findings and requested a hearing to the Chief Administrative Law Judge, U.S. Department of Labor.

IV. FACTUAL BACKGROUND AND THE PARTIES' CONTENTIONS

The Complainant was employed as a truck driver for the Respondent, an Oklahoma City, Oklahoma headquartered common carrier trucking, from August 21, 1997 until February 7, 1998. On February 6, 1998, Respondent dispatched Complainant from Henderson, Colorado to pick up meat loads from Dodge City, Kansas (TR 26-27; CX 1).

B. The Parties' Contentions:

Complainant:

Complainant alleges that on the morning of February 6, 1998 he went on duty near Denver, Colorado (CX 1; TR 26-27). Complainant proceeded to Dodge City, Kansas where he picked up a shipment of goods bound for Florida. *Id.* Complainant continued on route, stopping once in Buffalo, Oklahoma for dinner (TR 29-30). Around midnight of February 7, 1998 Complainant stopped for fuel at a truck stop in Oklahoma City, Oklahoma. (TR 31-32). Not able to find a place to park the truck and sleep, Complainant continued on to Respondent's Oklahoma City Terminal to have a safe and secure place to sleep (ALJ 1). Complainant arrived at the terminal at approximately1:05 AM, and alleges to have been awake for approximately fifteen hours and driving his assigned the truck for approximately 12.25 hours (TR 142; CX 1).

Upon arrival at the terminal, Complainant parked his assigned truck and entered the sleeping berth(TR 36). Within twenty minutes of his arrival at the terminal, the night dispatcher, Allen Smith (hereinafter "Smith"), started banging on the outside of Complainant's vehicle and ordered the Complainant to drive his vehicle through the inspection lane (TR 37-38, 182).

Complainant attempted to explain that he only entered the Respondent's facility to secure a safe place to sleep and went back to the sleeping berth (TR 39).

Sometime later, Smith began banging on the side of the vehicle again, insisting that Complainant "pull though" the inspection lane (TR 40). Complainant responded to Smith and told him it was not legal for him to drive because he was too tired and "out of hours." (TR 40). Smith continued to insist on Complainant's pulling through the inspection lane and threatened discharge. Complainant allegedly, reluctantly agreed to operate his vehicle illegally and go through the inspection lane (TR 41). Smith left the Complainant and returned to the terminal building.

Thereafter, the Complainant decided to drive his truck away from the Respondent's property and find a place to sleep (TR 43). To stop the Complainant, Smith jumped in front of the moving tractor trailer. *Id.* Complainant allegedly stopped the truck whereupon Smith informed him that if he did not go through the inspection lane he would be fired (TR 44-45). Complainant then proceeded to the inspection lane when Smith informed the Complainant that he was fired under the instructions of Nick Cooke, Respondent's terminal manager. Complainant argued with Smith and tried again to leave the Respondent's facility with the truck and find somewhere to sleep (TR 49). Again, Smith tried to stop the Complainant by jumping in front of the tractor trailer. Police were called and Bill Custodio, a safety supervisor for the Respondent, arrived at the terminal (TR 55). Complainant told Custodio he was fatigued and out of hours when he refused to go through the inspection lane (TR 56). Custodio took the Complainant to a motel to sleep (TR 57). Finally, on February 9, 1998, Complainant went to speak with Tom Beamer where his termination was confirmed.

Based on the above allegations, Complainant asserts that Respondent violated Section 31105(a) of the Act by discharging him when he refused to operate a commercial vehicle in opposition with federal regulations. Section 31105(a) provides:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because ----....
>
> (B) the employee refuses to operate a vehicle because ---
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;
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> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or

serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

The primary agency responsible for regulating trucking industry practices under the STAA is the Department of Transportation (DOT). *See* 49 U.S.C.A. §§§§31136, 31502. The complaint implicates several DOT trucking regulations in some manner submitted. A brief review of the regulations provides an appropriate context for an analysis of the legal issues presented. The applicable regulation that Complainant asserts was violated is 49 C.F.R. §§392.3 which states:

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

The Department of Transportation also regulates the maximum number of hours that drivers may work, under rules found at 49 C.F.R. Part 395, Hours of Service of Drivers. As a general rule, a driver can be "on duty" (i.e. waiting to drive, inspecting the vehicle, loading/unloading, driving, waiting for vehicle repair, etc.) no more than 15 hours after an eight-hour rest period, and may drive no more than 10 hours during the "on duty" period. 49 C.F.R. §§395.3(a). Complainant also alleges a violation of the hours of service rules.

Respondent:

Respondent contends a different set of facts. At approximately 12:05 am on February 7, 1998, Smith observed the Complainant entering and parking his truck in the yard. Smith is generally in charge of supervision of the terminal yard, the vehicles entering and leaving the yard, and ensuring vehicles are fueled and inspected upon arrival (TR 133). After about ten minutes, Smith noted that the Complainant did not enter the fuel/inspection lane at the terminal according to Respondent's policy. Smith then approached Complainant's tractor and knocked on the door to remind him of the requirement to pass through the fuel/inspection lane (TR 144). Complainant responded by telling Smith he was tired and had been driving a long time (TR 144-145). Complainant then went back to the sleeping berth. Smith knocked again and repeated the mandatory policy of driving through the fuel/inspection lane. After some more discussion, Complainant gave Smith the impression that Complainant intended to move through the inspection lane and Smith started to return to his office (TR 145). However, Complainant attempted to exit the terminal on to South west 20th street (TR 147-148). Smith alleges he attempted to stop Complainant from leaving the terminal by standing in front of the truck (TR 147). As Smith stood in the roadway, Complainant began to inch closer and closer with his truck to where Smith was standing until he was eventually "bumping" him with the front of the truck (TR 148). Smith alleges the Complainant's truck bumped him several times (TR 149). Finally, Smith persuaded Complainant not to leave the terminal and to go through the inspection lane (TR 150).

After the interaction with the Complainant, Smith returned to his office and called his supervisor and the terminal manager, Nick Cooke (hereinafter "Cooke") (TR 150-151). Smith told Cooke the incidents that occurred with the Complainant but did not relay that the Complainant said he was too tired to drive through the inspection lane (TR 156). Cooke told Smith to terminate the Complainant immediately (TR 156, 211). After the phone call Smith approached Complainant's truck, which was in line for the fuel island and informed him that he was terminated, per Cooke's instructions (TR 158). Complainant then went to his truck and would not respond to Smith. At this time, Smith asked the night fleet manager, John Zila (hereinafter "Zila"), to intervene and speak to the Complainant (TR158, 199). Complainant would not speak to Zila and instead tried to drive out of the terminal into the street (TR 159-160, 200).

For a second time, Smith attempted to stop Complainant from leaving the terminal (TR 160). Complainant did not respond to Smith and again starting bumping Smith with the front of the truck (TR 160-161). Zila also witnessed this incident (TR 200-201). After the confrontation Respondent's employee called the police and Bill Custodio, regional safety manager, to the Rocor terminal. Respondent argues that they discharged Korolev for legitimate, nondiscriminatory reasons, namely, his confrontation and insubordination to Allen Smith on February 6 and 7, 1998.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

DISCUSSION

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). Under that framework, the Complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the Respondent is successful, they rebut the prima facie case, and the Complainant must then prove, by a preponderance of the evidence, that the legitimate reasons proffered by the Respondent were merely a pretext for discrimination. See also Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

To establish a prima facie case of retaliatory discharge, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer. Moon, supra, 836 F.2d at 229. The Secretary takes the position that, in establishing the "causal link" between the protected activity and the adverse action, showing that the employer was aware of the protected activity at the time it took the adverse

action is sufficient. See Osborn v. Cavalier Homes, 89-STA-10 (Sec'y July 17, 1991); Zessin v. ASAP Express, Inc., 92-STA-33 (Sec'y Jan. 19, 1993).

Proof of a prima facie case is not proof of discrimination. An employer may rebut the prima facie case by articulating a legitimate non-retaliatory reason for the adverse action. The employee is successful only if he meets his overall burden of proving that the employer's motive for the adverse action was discriminatory. When Respondent asserts both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. Spearman v. Roadway Express, Inc., Case No. 92-STA-1, Sec. Final Dec. and Ord., Jun 30, 1993, slip op. at 4, *aff'd sub nom.* Roadway Express, Inc. v. Reich, No. 93-3787 (6th Cir. Aug. 22, 1994), 1994 U.S. App. LEXIS 22924 and Yellow Freight System, Inc. v. Reich, 27 F.3d 1133, 1140 (6th Cir. 1994). Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even without protected activities. Asst. Sec. and Chapman v. T. O. Haas Tire Co., Case No. 94-STA-2, Sec. Final Dec. and Ord., Aug. 3, 1994, slip op. at 4, *appeal dismissed*, No. 94-3334 (8th Cir. Nov. 1, 1994).

It is undisputed that Complainant was terminated, which is an adverse employment action. Further Complainant's termination action form stated that the reason for the termination was at least in part due to his refusal to drive through the inspection lane upon arrival to the Respondent's depot (CX 2). The temporal proximity between the protected activity and the adverse action can raise an inference of causation. Zessin v. ASAP Express, Inc., Case No. 92-STA-33, Sec. Dec., Jan. 19, 1993, slip op. at 13; Bergeron v. Aulenback Transp., Inc., 91-STA-38, Sec. Dec., Jun. 4, 1992, slip op. at 3. Williams v. Southern Coaches, Case No. 94-STA-44, Sec. Dec. Sept. 11, 1995. Complainant asserts that his refusal to drive was based upon inability caused by fatigue and excessive hours of service, and therefore, safety was compromised. Under the employee protection provisions of the STAA enforced by the Secretary of Labor, imposing an adverse action on an employee is unlawful for an employer because the employee has complained or raised concerns about possible violations of these DOT regulations. 49 U.S.C.A. §§31105(a)(1)(A). *See, e.g.*, Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4, Dec. and Ord. on Recon., May 19, 1994, slip op. at 6-7 and cases there cited. Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to work because operating the vehicle would violate DOT regulations or because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C.A. §§31105(a)(1)(B). The question becomes whether Complainant's actions on February 7, 1998 constituted activity protected under these provisions.

Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding such refusal under the particular requirements of each of the two refusal to drive provisions. Under the "actual violation" category, a refusal to drive is protected only if the record establishes that the employee's driving of the commercial motor vehicle would have been violating a pertinent motor vehicle standard. Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76, 81 (2d Cir. 1994); *Cortes*, slip op. at 4 (citing Yellow Freight Systems v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993)). Under the "reasonable apprehension" category, the employee's

refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. Reich, 38 F.3d at 82; Jackson v. Protein Express, ARB Case No. 96-194, ALJ Case No. 95-STA-38, Fin. Dec. and Rem. Ord., Jan. 9, 1997; Brown v. Wilson Trucking Corp., Case No. 94-STA-54, Sec. Dec. and Rem. Ord., Jan. 25, 1996, slip op. at 4 and cases there cited. The statute requires an employee who refuses to drive under these provisions to tell their employer providing an opportunity for the employer to address the concern and possibly to correct the source of that concern.

Complainant contends that Smith's directive, derived from Rocor's policy which required him to drive through the inspection/fuel lane violated 49 C.F.R. §392.3 due to fatigue and required him to exceed the ten hour driving limit imposed by 49 C.F.R. §395.3. Respondent advances several arguments why Complainant's failed to show either engagement in protected activity or causality between such activity and the adverse employment action. First, Respondent argues that requiring the Complainant to drive his truck through the inspection lane was not the type of 'operation' of a motor vehicle covered by either of the above referenced regulations because it did not involve a public roadway, only a self-contained terminal yard (*Respondent's Final Argument* at 10). Respondent does not cite any case law supporting this argument. In reviewing the regulations I do not find any statutorily created exceptions carving out a private property exception[7]. The Secretary has stated that courts should interpret the STAA liberally to promote an interpretation of the Act which is consistent with its Congressional intent, namely, the promotion of commercial motor vehicle safety on the nations highways. *See generally,* Boone v. TFE, Inc., 90-STA-7, (Sec'y. July 17, 1991) DOL Decs. Vol. 5, No. 4, p. 160, 161, *aff'd sub nom.,* Trans Fleet Enterprises, Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 1998-STA-9 and 11 (ARB Feb.18, 1999).
Therefore, I am bound by the plain meaning of the statute which is to prohibit, without limitation, a driver from operating a commercial motor vehicle while his ability and alertness are impaired.

Further, Respondent argues company policy requires drivers to pull through the inspection lane to promote safety. Complainant merely decided it would be an inconvenience to comply (*Respondent's Final Argument* at 9). I am not persuaded by this argument. While safety policies created by trucking companies are extremely important, "[t]o permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits." Assistant Secretary of Labor forOccupational Safety and Health and Bill J. Self v. Carolina Freight Carriers Corp., Case No. 91-STA-25, Sec. Dec., Aug.6, 1992, slip op. at 7-8 (citing cases). As such, to comply with the Respondent's safety requirement and pull though the inspection/fuel lane, would force Complainant to violate DOT regulations due to his stated fatigue and time limit violations.

[7]Complainant advanced numerous cases and arguments pertaining to a private property exception.. Absent clear statutory intent or case law precedent, I will refrain from evaluating and deciding this issue in the context of this claim.

Respondent's further assert that Complainant's actions after his fatigue-based refusal to drive through the inspection lane, specifically attempting to drive the truck out of the terminal, forfeits STAA protection (*Respondent's Final Argument* at 8). Their argument states, although Complainant's conduct in parking his vehicle upon arrival at the terminal may be deemed a refusal to drive to the fuel/inspection lane, he, nevertheless, did drive out of the terminal and onto a public street. *Id.* Upon review, this argument is not persuasive While Complainant's actions following his refusal to drive may affect the ultimate outcome of this claim, they are not probative as to the initial question of whether the STAA protects Complainant's actions. As Respondent admits, had Korolev merely refused to proceed to the fuel/inspection lane without any further activity by him and he was terminated on that basis, he would arguably have engaged in protected activity (*Respondent's Final Argument* at 9, *footnote* 1).

Respondent also argues that "Korolev, due to his own conduct, was at least two hours, and probably more than three hours, "out of time" when he arrived at the Rocor Oklahoma City terminal, and if he was "too tired" as he claimed, his condition was self created (*Respondent's Final Argument* at 11). Upon review of the record, I find Complainant's initial refusal to drive his truck though the fuel inspection lane was reasonable under the circumstances. Neither party disputes Complainant had driven his truck over the statutory limit for hours of service when he arrived at the Oklahoma city terminal (CX 1 at 5; RX 1).[8] At the hearing, Complainant testified as follows:

Q: How many hours have you been awake since your prior sleep period when you arrived at Rocor's terminal?

A: I don't know. I have to count. Since 7:00 or 7:30 or since 7:00 of previous morning.

Q: So about 19 hours? Would that be about right?

A: Yes, sir. -----

----- Q: Do you believe when you arrived at the Rocor terminal that your ability and alertness were impaired?

A: Absolutely, yeah.

Q: Was that due to fatigue, in your opinion?

A: Yes, sir.

Q: Do you believe it would have been safe for you to drive through the inspection lane at the Rocor terminal on February 7, 1998?

A: Excuse me? Could you repeat that.

Q: Would it have been safe for you to drive through the inspection lane when [you] arrived on February 7, 1998?

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[8]They do, however, dispute the actual amount of time Complainant drove the truck. Upon comparison of the two logs submitted by the Complainant and the Respondent there appears to be some discrepancies as to the time driving recorded by the Complainant. Complainant testified at the hearing that the log marked RX 1 was written on a daily basis in conjunction with his activities at Rocor and CX 1 was written sometime after February 7, 1998 (TR 81-83). Upon review, I find RX 1 credible evidence of Complainant's driving logs.

A: No, I— it's not safe to drive at all in the condition I been. I couldn't find a safe place to park, that's why I have to.

I find this testimony on this issue credible as it is also corroborated by Allen Smith, the night supervisor, and consistent with the driving logs. In his testimony, Smith, does not dispute that he was aware of Korolev's refusal to drive based on complaints of fatigue and hours of service violations. In a statement dated June 11, 1998, Smith stated :

> At about 12:05 AM, on February 7, 1998, I observed the tractor-trailer driven by Alexander Korolev enter the terminal yard. After about ten minutes, I noted the vehicle had not entered the inspection and fuel lane, as required by company policy, which is required knowledge by all company drivers. I therefore walked out in the yard, to where Korolev was parked and knocked on the door of his tractor to get his attention. He came out of his sleeping berth and asked what I wanted. I explained that it was company policy that he have his vehicle fueled and inspected, upon entering the yard. Korolev acted extremely irrate, complained that he had been driving about fifteen hours and he was out of hours and tired (CX 9 at 2).

Allen Smith's acknowledgment of Complainant's refusal to drive based on fatigue was also corroborated by his hearing testimony(TR 145). It is well established that complaints to managers about long hours and resulting fatigue are sufficient to establish a prima facie case of protected activity pursuant to STAA section 405(b). Ass't Sec'y & Brown v. Besco Steel Supply, 93- STA-30 (Sec'y Jan. 24, 1995).

Upon review of the record, I find Complainant's refusal to drive on the night in question, reasonable in light of the evidence and testimony at the hearing. Therefore, protected activity is established. For the foregoing reasons, I find that the complainant has demonstrated, by a preponderance of the evidence, a prima facie case of discrimination under Section 31105 of the Surface Transportation Assistance Act.

Dual Motive Analysis

The focus of the dispute is, therefore, whether Respondent's would have terminated the Complainant solely based on their alternative proffered reason for dismissal, Complainant's wilful and deliberate insubordination and confrontation with Smith. The Secretary has stated that where a respondent has introduced evidence to rebut a *prima facie* case of a violation of an employee protection provision, it is unnecessary to examine the question of whether the complainant established a *prima facie* case. Where the Respondent produces evidence of a legitimate, nondiscriminatory reason for the adverse action, the relevant question is whether the complainant showed by a preponderance of the evidence that one of the real reasons he or she was discharged was his or her safety complaints. Olson v. Missoula Ready Mix, 95-STA-21 (Sec'y Mar. 15,

1996). This principle was set forth in United States Postal Serv. v. Aikens, 460 U.S. 709 (1983), which has been repeatedly emphasized and applied in recent decisions by the Board and the Secretary of Labor. *See, e.g.*, Jones v. Consolidated Personnel Corp., ALJ Case No. 96-STA-1, ARB Case No. 97-009, Jan. 13, 1997; Etchason v. Carry Cos., Case No. 92-STA-12, Sec. Dec., Mar. 20, 1995, citing Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11, *aff'd*, 78 F.3d 352 (8th Cir. 1996). As the Supreme Court stated in Aikens:

> Because this case was fully tried on the merits, it is surprising to find the parties and the [court] still addressing the question whether [the plaintiff] made out a *prima facie* case. . . .
> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination].

460 U.S. at 713-14, 715 (emphasis added). Thus, because Rocor presented rebuttal evidence, the answer to the question whether Korolev made a *prima facie* showing in this case is not necessary. The critical factual inquiry is whether retaliatory animus motivated the adverse employment action.

Respondent's assert that they fired Complainant for two reasons. First because Complainant refused to pull through the inspection lane and thereby violated Rocor policy and secondly because of the violent and hostile confrontation between Smith and the Complainant. As Smith testified, in attempting to persuade Complainant to pull through the fuel/ inspection lane, Complainant sought to drive his truck off of the terminal property. When he was confronted by Smith, Complainant bumped him with his truck. This bumping occurred both before and after the Complainant was terminated. The Secretary held that the right to engage in statutorily protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. Citing NLRB v. Leece-Neville Co., 396 F.2d 773, 774 (5th Cir. 1968) the Secretary stated: "A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline. The issue of whether an employee's actions are indefensible under the circumstances turns on the distinctive facts of the case." Under the present set of facts, I find Complainant's actions in dealing with Smith were unreasonable.[9]

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[9] This issue has also been addressed under Title VII of the Civil Rights Act of 1964. Case law has stated, "certain forms of 'opposition "conduct, including illegal acts or unreasonably hostile or aggressive conduct, may provide a legitimate, independent and nondiscriminatory basis for sanctions." EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012 (9th Cir. 1983). Stated differently, the form of opposition may remove Title VII protections. *Id*. at 1015 and nn. 4, 5, citing Rosser v. Laborers' Intern. Union of North America, 616 F.2d 221, 223 (5th Cir. 19xx), *cert. denied,* 449 U.S. 886 (1980); Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978). See

While Complainant disputes the allegations pertaining to bumping Smith with his truck, I find Smith's testimony at the hearing and through written statement credible and in accord with the other evidence of record (CX 9). First, Smith's account of the second confrontation is corroborated by an eye witness testimony of Zila (TR 200-201). Testimony also shows that Smith called Cooke to tell him about the first incident with Complainant. In their conversation, Cooke corroborates Smith's version of events (TR 211). Further, the Complainant asserts that the personnel action form written by Respondent does not mention insubordination and thus this reasoning is pretextual (CX 2). Alternatively, Complainant asserts that the confrontation occurred after he was already discriminated against. In Lajoie v. Environmental Management Systems, Inc., 90-STA-31 (Sec'y Oct. 27, 1992), slip op. at 14, the Secretary noted that under the NLRA, a bona fide discriminatee who engages in post-discrimination misconduct can forfeit his or her entitlement to being made whole, Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1385-86 (8th Cir. 1980), but that STAA section 405(c)(2)(B), 49 U.S.C. app. §§ 2305(c)(2)(B) may proscribe remedial limitation in that it states that if the Secretary determines that a violation has occurred, the Secretary "shall order" reinstatement together with back pay and compensatory damages.

Upon review, the personnel action form, while insubordination is not listed as the cause for dismissal, it does mention that the police were called to diffuse the confrontation. Further, Bill Custodio was also called into to diffuse the situation (TR 226-235). This lends credibility to Smith's account of a hostile confrontation. *Id.* Taking all of the evidence into account, I find that the Respondent's actions in terminating the Complainant on the basis of the confrontation with Smith reasonable under the circumstances. This analysis comports with case precedent. As stated in American Nuclear Resources, Inc. v. United States Dep't of Labor, 134 F.3d at 1293, 1296, even if employee had engaged in protected activity, an employer may discharg him because of "interpersonal problems," including "rude and abrasive" behavior. *See also*, Kahn v. United States Sec'y of Labor, 64 F.3d at 279-280 (employee's abusive and inappropriate behavior toward co-workers, rather than whistleblowing activity, was the legitimate nondiscriminatory reason for discharge); Lockert v. United States Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989) (employee disobedience motivated discharge); Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986) (employee's legitimate discharge occasioned by cavalier attitude, abusive language and defiant conduct).

Therefore, even assuming that the Complainant established a prima facie case, the Respondent demonstrated a legitimate reason for discharging him, which successfully rebuts the inference that the adverse action was motivated by the protected activity. The evidence showed that after the Complainant refused to drive the truck for safety reasons, the Complainant attempted to drive his truck off of the Respondent's property. When Complainant's supervisor tried to stop him, Complainant bumped him with his truck . Even when employees engage in

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Jennings v. Tinley Park Comm. Consol Sch. Dist., 146, 864 F.2d 1368, 1372 (7th Cir. 1988) (decision to discipline employee "whose conduct is unreasonable, even though borne out of legitimate protest, does not violate Title VII").

protected activity, employers may legitimately discipline them for insubordination and disruptive behavior. Logan v. United Parcel Service, 96-STA-2 (ARB Dec. 19, 1996) (in dual motive case, Respondent established by preponderance of evidence that it would have discharged Complainant even if not for the protected activity where Complainant was insubordinate with a manager, used a tape recorder on company time, acted inappropriately toward officials when a relief driver arrived, had a history of past disruptions and threats, and Complainant could not explain his behavior). Hence, the Complainant's insubordination was a legitimate reason for his discharge.

VI. CONCLUSION

The Complainant engaged in protected activity when he refused to drive his truck on February 7, 1998. However, Respondent discharged Complainant on the basis of his entire conduct which included both this protected activity and unprotected activity. Respondent would have discharged Complainant regardless of the protected activity, however, based solely on a legitimate nondiscriminatory reason -- a confrontation with a co-worker.

ORDER

The complaint of **Alexander Korolev** is **DENIED.**

SO ORDERED.

LAWRENCE P. DONNELLY

Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. §§ 1978.109(a); 61 Fed. Reg. 19978 (1996).